

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
Elimination of Rate-of-Return)	RM - 10822
Regulation of Incumbent)	
Local Exchange Carriers)	

Statement In Opposition to the Petition for Rulemaking filed by Western Wireless Corporation on 10/30/2003 and Noticed on 11/19/2003

Statement of Beacon Telecommunications Advisors, LLC

Beacon Telecommunications Advisors, LLC (Beacon) submits this statement in opposition to the Petition for Rulemaking filed by Western Wireless Corporation (WWC) regarding the Elimination of Rate of Return Regulation of Incumbent Local Exchange Carriers¹. Beacon is a regulatory, financial, and management consulting firm providing services to small, rural incumbent local exchange carriers (ILECs) throughout the United States.

Summary

While the FCC has already given notice to the WWC Petition for Rulemaking per CFR section 1.403, Beacon Telecommunications Advisors, L.L.C. respectfully comments that WWC's Petition does not in actuality meet the technical requirements of section 1.401 and therefore should not have been given notice. However, since that has already happened, WWC's Petition for Rulemaking should be dismissed on any one of following four grounds: It is not clear as to exactly what WWC is requesting, it is premature, it does not indicate how WWC as the petitioner will be affected, and it plainly does not

¹ FCC Petition for Rulemaking Filed released 11/19/03

warrant consideration in that WWC may be using this as a vehicle to subvert the *Joint Board Portability proceeding*².

The WWC Petition Is Not Clear on What It Is Asking the FCC To Do

This petition should be dismissed because it is not clear as to “the text or substance of the proposed rule, amendment, or rule to be repealed”.³ It is unclear if WWC is petitioning for the elimination of rate of return (RoR) regulation of all ILECs⁴ or for the replacement of the existing RoR cost-based system with a forward-looking cost-based system for the calculation of interstate access charge rates and the calculation of Federal Universal Service Funds (FUSFs).⁵

On the one hand, if WWC were petitioning for the elimination of RoR in its entirety, this would clearly affect all ILECs, not just small and mid sized ILECs. No ILEC, to this point, has publicly waived their 5th amendment rights with regards to confiscation in the interstate jurisdiction. The replacement of the current RoR regulatory mechanism with some sort of forward looking regulatory mechanism would replace years of regulatory practice and reinterpret existing case law. This most certainly would generate legal challenges. This would also bring to the front the long-ignored issue of stranded investment once and for all.

If on the other hand, WWC is really asking for the replacement of RoR regulation methodologies with forward looking costing methodologies for price setting and

² *Federal-State Board on Universal Service Seeks Comment on The Commission's Rules Relating to High-Cost Universal Service Support and the ETC Designation Process*, Public Notice, CC Docket No. 96-45, FCC 03J-1 (rel. Feb. 7, 2003) (“*Joint Board Portability Proceeding*”).

³ CFR 47 section 1.401(c)

⁴ See the title of the Petition “Elimination of Rate-of-Return regulation of Incumbent Local Exchange Carriers”; Appendix A “Rate of Return Regulation: Problems That Can No Longer Be Ignored”; and Appendix B “Rate of Return Regulation: A Failed Model for Economic Regulation”. The title and both papers refer to more than just rural ILECs (RLECs) thus leaving the impression that the WWC Petition is addressing more than just RLECs. See also the prefatory comments with particular emphasis on the “Top 10 Reasons to Eliminate Rate-of-Return (ROR) Regulation” that likewise references ILECs rather than RLECs, e.g., #2, #3, and #4. Note: As any late night TV viewer knows, the proper format for any Top 10 list is not from 1 to 10, but rather from 10 to 1.

⁵ See Introduction and Summary which specifically references eliminating RoR regulation of RLECs for “purposes of determining their federal high-cost universal service support and interstate access charges”

calculation of FUSF amounts for small and mid sized RoR ILECs, this is more analogous to what has already been done for the price cap and/or non-rural ILECs, respectively. It can be argued that price cap ILECs do not necessarily set their interstate access prices using “rate-of-return” costing. However, this does not mean that the price cap ILECs necessarily use “forward-looking costs” for pricing either. Furthermore, the FUSF model used for non-rural ILECs is a proper “forward looking” model only to the extent that it models a circuit switched network architecture that is almost 5 years old. In short, there could be an argument raised as to whether these “forward-looking cost based” systems in place for price cap and/or non-rural ILECs may not meet the requirements petitioned for by WWC for non-price cap and/or rural ILECs.⁶

The point is that replacing RoR regulation for confiscation purposes is a much different and larger issue than replacing RoR regulation for the calculation of interstate access rates and/or FUSF amounts. In other words, for price cap ILECs, CFR 47 Part 69 - “Access Charges” is not currently used to directly determine the costs and therefore the prices associated with their interstate access services⁷, but certain sections do still apply. However, CFR Part 32 – “Uniform System of Accounts for Telecommunications Companies”; CFR Part 64 – “Miscellaneous Rules Relating to Common Carriers”, Subpart I – “Allocation of Costs”; CFR Part 36 – “Jurisdictional Separations Procedures; Standard Procedures for Separating Telecommunications Property Costs, Revenues, Taxes And Reserves for Telecommunications Companies”; and some parts of CFR Part 65 – “Interstate Rate of Return Prescription Procedures and Methodologies” still apply to interstate price cap ILECs. For price cap and non-rural ILECs, the current FUSF rules contained in CFR 47 Section 54 – “Universal Service” have relevant portions that might still be applicable.

Therefore on one hand if the WWC petition wants to eliminate RoR regulation of ILECs it would require the replacement of all or part of CFR Parts 32, 64, 36, 69, 65 and

and the conclusion which specifically references phasing out RoR regulation as the basis for small and mid-size ILECs’ “universal service disbursements and access charges”.

⁶ Assuming the WWC petition wants the access charge methodologies applicable to small and mid sized RoR ILECs more analogous to the methodologies applicable to price cap ILECs, the Interstate Access Support (IAS) currently applicable only to price cap ILECs does not seem to be based on forward-looking costs. As such the IAS seems to be inconsistent with what the WWC petition wants for small and mid-size ILECs.

⁷ CFR 47 section 69.1(c).

61. On the other hand, if the WWC petition wants to eliminate RoR for the calculation of interstate access rates and FUSFs for small and mid-size ILECs, it would “only” require the replacement of part 69 and certain sections of parts 36 and 54.

Even on a very superficial level, both of these issues referenced in the WWC petition are not the same thing. The fact that the WWC petition seems to flip back and forth between these two different issues in the same petition is an undeniable indication that it is not at all clear exactly what WWC is wanting and therefore should be dismissed.

The WWC Petition is Premature

Assuming that the WWC petition is really only interested in the replacement of RoR for the calculation of interstate access charge rates and the calculation of FUSF amounts, the second way that this petition does not meet the requirements of section 1.401 is that even by WWC’s own admission, both of these issues are either scheduled to be addressed at the end of a clearly defined 5 year transition period that is scheduled to expire in mid 2006 and/or is already being addressed in other dockets. Therefore this petition is premature⁸ and should be dismissed. Quoting from page 42, WWC states:

“In the RTF Order, the Commission determined that the key elements of that plan would remain in place for a five-year stability period, running through mid 2006. Similarly, in the MAG Order, the Commission concluded that the key features of the access charge reform plan adopted in that order should remain in place for the same five-year period. Western Wireless believes that the Joint Board and the Commission must keep their promises and deliver the regulatory stability that promised the ILECs and competitive ETCs alike, which is crucial for investment and economic decision-making. However, it is certainly timely for the Commission to begin now to lay the ground work necessary to begin eliminating rate-of-return regulation as of the end of the 5-year RTF stability period, **as was presaged in the RTF Order.** (footnotes omitted)(emphasis added)

Therefore in both the MAG Order, which addressed interstate access charge issues for non-price cap ILECs and the RTF Order, which addressed FUSF issues for rural ILECs, there is a 5-year expiration where replacement mechanisms would be addressed. If, as

⁸ CFR 47 section 1.401(e)

WWC states, the elimination of RoR regulation at the end of the 5-year period was presaged in the *RTF Order*⁹ then this provides further evidence that the FCC would reasonably address this very issue during the customary notices required for the development of the replacement mechanism.

Furthermore, regarding FUSFs, on page 42, WWC indicates that it is more than satisfied with the current schedule when it states “[f]irst, the new rules should not become effective until 2006, upon the expiration of the five-year period provided by the *RTF Order*...”. Therefore WWC is not advocating a different timetable for implementation of the replacement mechanism. Since the Commission is fully aware of the 5-year time frame and the need to address the replacement mechanism; and the Commission is fully aware of the issues raised by WWC since most, if not all, came from the Commission’s *RTF Order*; and the Commission is fully capable of writing its own notice; and the Commission has yet to issue any notice in this proceeding, this petition is premature.

The Commission should follow its normal procedure and issue its own Notice that would be expected to address the issues already identified in the *RTF Order*, which would include, but not be limited to, the ones raised by the premature WWC petition. Since WWC raises no new issues, this petition is premature and, therefore, should be dismissed.

The WWC Petition Does Not Indicate How Its Interests Will Be Affected

The third way that this petition does not meet the requirements of section 1.401 is that WWC does not indicate how its interests will be affected¹⁰. The only hint of how its interests may be affected is on page 42 referenced above (see underlined portion) when WWC states that it wants the regulatory stability offered by the 5-year life of the procedures in both the *MAG Order* and the *RTF Order*. By maintaining the current schedule, WWC is protecting its revenue stream for the remainder of the 5-year schedule. However, it is by no means clear that this is how WWC thinks that its own interest will

⁹ *Federal-State Joint Board on Universal Service*, Fourteenth Report and Order, 16 FCC Rcd 11244, 11310 (2001) (“*RTF Order*”),

be affected. Since WWC does not clearly articulate how its interests will be affected per section 1.401(c), this petition should be dismissed.

The WWC Petition Appears to Be An Attempt to “End Run” the *Joint Board Portability Proceeding*

The fourth and perhaps most troubling reason why this Petition should be dismissed is that procedurally WWC appears to be trying to “end run” the *Joint Board Portability Proceeding*. After spending almost the entire petition discussing the intellectual reasons underlying its petition, the conclusion, contained in the last three sentences of the WWC Petition, states:

“For the foregoing reasons, the Commission should take expeditious actions to phase out rate-of-return regulation as the basis for small and mid-size ILECs’ universal service disbursements and access charges. This would serve the public interest far more efficiently – and would control the growth of the fund much more effectively – **than some of the anti-competitive proposals that the ILECs have advocated in the *Joint Board Portability Proceeding***. Instead of the antiquated, inefficient, and anti-competitive system of ROR regulation, the Commission should develop a regulatory system based on forward-looking cost.” (emphasis added)

The assertion that this Petition is “better than some of the ‘anti-competitive’ proposals that the ILECs are proposing in the *Joint Board Portability Proceeding*” clearly indicates that WWC is trying to forestall a possible recommendation by the Joint Board regarding portability simply because the possible outcome is not to its liking. WWC had the opportunity to file this Petition, especially the portion regarding FUSFs as a part of its comments in the portability proceeding.

Since WWC chose not to file in the appropriate forum, it is patently unfair to give WWC a second bite at the “portability” apple. This attempt by WWC to end-run the *Joint Board Portability Proceeding* simply because the possible outcome is not to its

¹⁰ CFR 47 section 1.401(c)

liking indicates that this Petition for Rulemaking plainly does not warrant consideration¹¹. Accordingly, this petition should be dismissed.

Conclusion

Beacon files this statement in opposition to the Petition for Rulemaking filed by the Western Wireless Corporation regarding the Elimination of Rate of Return Regulation of Incumbent Local Exchange Carriers. This Petition should be dismissed because it is not clear in what it is asking, it is premature in that these issues are already scheduled to be addressed, it does not indicate how WWC as the petitioner will be affected, and it plainly does not warrant consideration in that WWC appears to be using this as a vehicle to subvert the *Joint Board Portability proceeding*.

Respectfully submitted,

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[Filed Electronically]

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¹¹ CFR 47 section 1.401(e)